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No. 06-949

Supreme Court, U.S.
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In The

Supreme Court of the United States

PETER F. CLOEREN,

Petitioner,

v.

ROBERT L. DRUSCHEL,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Wisconsin, District III

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where an individual has personally signed the promissory note for the purchase of a forum state business, and has continued to contact the forum state for the purpose of operating that business, may the individual's post-sale contacts be considered in establishing personal jurisdiction over the individual in the forum state?

2. Does the fiduciary shield doctrine present an important federal question?

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OPINION AND ORDER AT ISSUE IN THE CASE

Respondent has no additions to the Opinions and Order at issue referenced by the Petitioner.

BASIS OF JURISDICTION

Respondent agrees with the Petitioner's jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondent has no additions to the statutes and regulations referenced by the Petitioner.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Peter F. Cloeren is the CEO and majority shareholder of The Cloeren Company a/k/a Cloeren, Inc. ("Cloeren, Inc."), a Texas corporation and a business started by Mr. Cloeren and his father. (Pet. App. at 57-58, 106-107). Mr. Cloeren is also the President of Production Components-Cloeren, Inc., a Wisconsin corporation acquired by Cloeren, Inc. in 1997. (Pet. App. at 119).

Since the early 1990s, Cloeren, Inc. has had an employee located in Wisconsin who was engaged in sales. (Pet. App. at 106). Mr. Cloeren has been in daily contact by telephone with employees of Cloeren, Inc. and Production Components-Cloeren, Inc. when those employees were

located in the State of Wisconsin. (Pet. App. at 105, 107, 116).

In 1997, Mr. Cloeren and others, on behalf of Cloeren, Inc., began serious discussions to purchase a business then known as Production Components/Chippewa Valley Die, Inc. ("Production Components"), a Wisconsin corporation located in Eau Claire, Wisconsin. (Pet. App. at 2). Robert L. Druschel ("Druschel") was a stockholder of Production Components. (Pet. App. at 57).

Eventually, in September 1997, Mr. Cloeren traveled to Eau Claire, Wisconsin to close the sale of the Wisconsin corporation, Production Components, to Cloeren, Inc. (Pet. App. at 108). After the closing, Production Components was renamed Production Components-Cloeren, Inc. (Pet. App. at 2, 59). Druschel agreed to stay on as an employee of the Wisconsin corporation. (Pet. App. at 2).

In partial payment for the sale of Druschel's stock to Cloeren, Inc., Mr. Cloeren personally signed and executed a Secured Promissory Note pledging to pay Druschel the sum of $2,200,000.00. (Pet. App. at 58). Mr. Cloeren also personally signed a Security Agreement-Pledge and Escrow Agreement pledging the stock Mr. Cloeren owned in Cloeren, Inc. as collateral to secure his Promissory Note. (Pet. App. at 58).

On or about February 26, 1998, Mr. Cloeren personally signed a Replacement Promissory Note. (Pet. App. at 59). Mr. Cloeren made several payments pursuant to the Secured Promissory Note and the Replacement Secured Promissory Note. (Pet. App. at 59-61).

Since 1997, in addition to his almost daily telephone calls, Mr. Cloeren has traveled to the Eau Claire, Wisconsin area approximately six to eight times. (Pet. App. at 26). Mr. Cloeren stayed two to four days each visit. (Pet. App. at 26).

In 2001, Production Components-Cloeren, Inc. began a lawsuit against some of its former employees in Chippewa County Circuit Court as Case No. 2001 CV 80. This lawsuit was personally authorized by Mr. Cloeren. (Pet. App. at 27). Mr. Cloeren appeared in Chippewa County, Wisconsin Circuit Court on March 16, 2001 to provide testimony in the lawsuit on behalf of Production Components-Cloeren, Inc. (Pet. App. at 118). In September of 2001, Druschel was named as an additional defendant in that litigation. (Pet. App. at 60). On December 10, 2001, Circuit Court Judge Roderick A. Cameron granted an order for judgment in favor of Druschel dismissing the causes of action against him in the Production Components-Cloeren, Inc. lawsuit. (Pet. App. at 60). This ruling was affirmed by the Wisconsin Court of Appeals on July 30, 2002. (Pet. App. at 60).

On June 19, 2003, Druschel sent notification to Mr. Cloeren stating Druschel's intent to exercise his option to declare due and owing the entire unpaid balance of the Replacement Secured Promissory Note, together with accrued interest due and payable as of September 1, 2003. (Pet. App. at 60-61). Mr. Cloeren failed to pay that balance. Druschel has received no payments of any kind from Mr. Cloeren pursuant to the Replacement Secured Promissory Note since September of 2002. (Pet. App. at 61).

II. PROCEDURAL HISTORY

Based on the default of Mr. Cloeren on the payments due on the Promissory Note, Druschel commenced the present lawsuit against Mr. Cloeren. (Pet. App. at 41).

On March 15, 2005, the Circuit Court entered an amended order which denied the motion of Mr. Cloeren for a dismissal for lack of personal jurisdiction. (Pet. App. at 26-28). The Circuit Court in its Amended Order Denying Defendant's Motion to Dismiss for Lack of Personal Jurisdiction over Defendant made the following findings of fact:

1. The Defendant has had six to eight visits to the State of Wisconsin since 1997. Said visits lasted from two to four days at a time;

2. The Defendant had approximately four conversations a week with Douglas Darrow while Douglas Darrow was in the State of Wisconsin. The topics of these conversations were sales, marketing, pending orders, employees, manifold designs for dies, and personal matters;

3. The Defendant had approximately two conversations a month with Leigh Darrow while Leigh Darrow was in the State of Wisconsin. The topics of these conversations generally regarded sales of Cloeren products;

4. The Defendant is involved in the management and owner of Cloeren, Inc.

5. Cloeren, Inc. is the owner of Production Components-Cloeren, Inc.

6. The Defendant is actively involved in the daily operation of Production Components-Cloeren, Inc. located in the City of Eau Claire, Chippewa County, Wisconsin;

7. The Defendant has had continuous and systematic general business contacts with the State of Wisconsin.

8. The contacts with the State of Wisconsin were substantial in nature and quality;

9. The visits were not the type of visits where someone changes planes or comes to the State of Wisconsin simply because a person has been sued;

10. The telephone calls constitute substantial contact with the State of Wisconsin;

11. The personal visits constitute substantial contact with the State of Wisconsin;

12. The State of Wisconsin has an interest in the present case in seeing the Plaintiff, a resident of Chippewa County, Wisconsin, was able to obtain relief in Wisconsin courts;

13. The Circuit Court for Chippewa County, Wisconsin is a convenient forum for the Plaintiff;

14. The Defendant, in approximately 2001, caused a lawsuit by a business he owns to be commenced against several individuals in the State of Wisconsin, including the present Plaintiff;

15. The legal issues in the present case are not complicated. It is unlikely the case will involve much discovery. The only issue is whether the Defendant paid the balance due on the promissory note. Determination of the issues will largely rely on documentation. The burden on the Defendant for defending this case in the State of Wisconsin is therefore not significant;

16. The State of Wisconsin has a great interest in having the case adjudicated here. It is in the

Plaintiff's interest in obtaining convenient and effective relief;

17. The interstate judicial system's interest in obtaining the most efficient resolution of the controversy is great and can be accomplished in the State of Wisconsin;

18. The shared interest of the several states in furthering fundamental and substantive social policies, such as are relevant in the present case, are not impeded by keeping the action in the State of Wisconsin.

In Mr. Cloeren's Answer to the Complaint of Druschel, Mr. Cloeren admitted he had defaulted on the Note but claimed Druschel had breached certain duties and obligations he owed to Production Components-Cloeren, Inc. (Pet. App. at 45). These were the same allegations made against Druschel in the 2001 Wisconsin lawsuit. Contrary to the assertions in the Petition for Writ of Certiorari (hereinafter "Petition"), at Pages 3 and 4, the claim Druschel violated any of his contractual agreements with Production Components-Cloeren, Inc. and whether these form an offset are issues disputed by Druschel and have never been proven. (Pet. App. at 12).

The Circuit Court, on August 29, 2005, granted summary judgment in favor of Druschel and against Mr. Cloeren. (Pet. App. at 15). In his oral decision, the Circuit Court found there were no issues of material fact which were in dispute in the lawsuit. (Pet. App. at 18). As to the affirmative defenses of Mr. Cloeren, the Circuit Court found that any offsets to which Mr. Cloeren claimed to be entitled were barred because of Mr. Cloeren's failure to follow the terms of the Stock Purchase Agreement which relate to such offsets. (Pet. App. at 20-22). The Circuit

Court also found that any possible claims Mr. Cloeren may have were barred by the doctrine of claim preclusion as the result of the previous lawsuit between Production Components-Cloeren, Inc. and Druschel, Chippewa County Case No. 01 CV 80. (Pet. App. at 22-23).

On October 11, 2005, Mr. Cloeren filed a Notice of Appeal with the Wisconsin Court of Appeals. The Wisconsin Court of Appeals, in its published decision in *Druschel v. Cloeren*, 2006 WI App 190, 723 N.W.2d 430, held Wisconsin had personal jurisdiction over Mr. Cloeren under the terms of the Wisconsin long arm statute; Mr. Cloeren's Wisconsin contacts were sufficient to satisfy the due process requirements for asserting personal jurisdiction; the Wisconsin courts had specific jurisdiction over Mr. Cloeren; and Mr. Cloeren was not entitled to offset damages under the plain language of the Stock Purchase Agreement. (Pet. App. at 1-12). Contrary to the claims of Petitioner, at Pages 3, 6, and 7 of the Petition, both the Wisconsin Court of Appeals and the trial court based their findings of personal jurisdiction over Mr. Cloeren on contacts both before and after the purchase of Production Components, including daily contacts with employees of Cloeren, Inc. and Production Compoents-Cloeren, Inc. while those employees were in Wisconsin. (Pet. App. at 5).

In discussing compliance with the due process clause of the Fourteenth Amendment to the United States Constitution, the Wisconsin Court of Appeals found the fiduciary shield doctrine has not been adopted in Wisconsin and that Mr. Cloeren's contacts were a direct result of his personal stake in the business evidenced by the Promissory Note he personally signed. (Pet. App. at 8). Contrary to Footnote 3 on Page 5 of the Petition, the Wisconsin Court of Appeals concluded that because Wisconsin has

specific jurisdiction over Mr. Cloeren, it did not need to address whether general jurisdiction exists as well. (Pet. App. at 9).

On August 31, 2006, Mr. Cloeren petitioned the Wisconsin Supreme Court for review. On October 10, 2006, the Wisconsin Supreme Court denied the Petition for Review without further comment. (Pet. App. at 39-40).

ARGUMENT

I. The Wisconsin Court's Finding Of Personal Jurisdiction Over Peter F. Cloeren Is Consistent With Existing Case Law.

Mr. Cloeren's argument is based upon the false premise that relevant Supreme Court decisions failed to provide him adequate guidance as to whether his activities "may subject [him] to the jurisdiction of [the State of Wisconsin]," (*Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment) such that he must resort to the allegedly conflicting Courts of Appeals decisions to determine the answer to that question. To the contrary, *Burger King Corporation v. Rudzewicz*, 471 U.S. 462 (1985), provided ample warning to Mr. Cloeren that his actions in entering into contractual agreements related to the purchase of a Wisconsin corporation and his subsequent involvement in the operation of that corporation *in Wisconsin* would subject him to the jurisdiction of the Wisconsin courts for any action alleging a breach of one of those contractual documents.

Mr. Cloeren argues in his Petition at Page 8 that facts in the present case present a jurisdictional question which was identified but not decided in this Court's decision in

Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 (1984). It should be noted this Court has previously denied a Writ of Certiorari when presented with an identical argument. *Tak How Investment Limited v. Nowak*, 520 U.S. 1155 (1997). Mr. Cloeren relies upon a single footnote in the *Helicopteros* decision for his argument. However, Mr. Cloeren's concerns attributed to the *Helicopteros* decision as to how this Court might answer that theoretical question are irrelevant in light of this Court's subsequent decision in *Burger King Corporation v. Rudzewicz*, 471 U.S. 462 (1985).

When analyzed under the *Burger King* framework, the facts of the instant case simply do not require this Court to address the "relatedness" issue described in great detail in the Petition. While the United States Courts of Appeals has indeed used a wide variety of language in describing the decision-making process to be applied under the *Burger King* rule, under any version of the *Burger King* rule, relatedness may be found in the instant matter. This case does not present a fact situation where review is necessary as the appropriate rule has been long established.

In discussing the jurisdictional issues before it in the *Burger King* case, this Court noted the well established requirement that an individual have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," 471 U.S. 472, *quoting Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment). This Court went on to reiterate that this requirement:

> is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum,

> and the litigation results from alleged injuries that 'arise out of or relate to' those activities.

Burger King, 471 U.S. at 472-73 (internal citations omitted).

Additionally, this Court stated:

> with respect to interstate contractual obligations, we have emphasized that parties who "reach out beyond one state and create continuing relationships and obligations with citizens of another state" are subject to regulation and sanctions in the other State for the consequences of their activities.

Id. at 473. And further:

> Moreover, where individuals "purposefully derive benefit" from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed. And because "modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity," it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity.

471 U.S. at 473-74 (internal citations omitted).

In discussing the particulars of the "purposeful availment" requirement, this Court noted that where a defendant "has created 'continuing obligations' between

himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there. . . ." 471 U.S. at 476. The commercial actor's lack of physical contacts cannot defeat personal jurisdiction so long as he has "purposefully directed" his efforts to residents of the forum State. *Id.*

In applying the principles discussed to the facts of the *Burger King* case, this Court:

> emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." It is these factors – prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing – that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

471 U.S. at 479 (citations omitted). The Court then held that Rudzewicz, a Michigan resident, had "deliberately 'reach[ed] out beyond' Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization" and that his resulting contacts with the forum State could "in no sense be viewed as 'random,' 'fortuitous,' or 'attenuated.'" *Id.* at 479-80.

In any event, even if resort to the various Courts of Appeals tests described by Mr. Cloeren in his Petition at Pages 12 through 22 were necessary, the facts of the

instant case support a finding of jurisdiction under any and all of the described analyses.

For example, Mr. Cloeren discusses the "proximate cause" analysis at Pages 12-16 of his Petition, and claims the facts in this case would fail under this version of the relatedness requirement. This is not accurate and the Wisconsin Court of Appeal's decision demonstrates the requirements of the "proximate cause" test would be met. (Pet. App. at 8-9).

Pursuant to the "proximate cause" relatedness requirement, Druschel needs to show the contacts which were the legal cause of the injury form an important or material element of proof in his case. In this case, the injury complained of was Mr. Cloeren's personal failure to make the payments to which he had individually obligated himself pursuant to the Promissory Note included among the contracts comprising the purchase of the Wisconsin corporation. The contacts which were the legal cause of that injury were all those contacts related to the "real object of the business transaction," which was the purchase of the Wisconsin corporation by Mr. Cloeren's Texas corporation. The Promissory Note at the heart of this litigation forms an integral part of the purchase contracts themselves which were the direct result of and indeed the motivation for Mr. Cloeren's contacts with Wisconsin. Therefore, pursuant to the "proximate cause" test, Mr. Cloeren urges this Court to consider that relatedness would be found sufficient to support the exercise of specific jurisdiction by the Wisconsin courts.

The "but for" analysis is described by Mr. Cloeren at Pages 16-18 of his Petition. According to Mr. Cloeren, under this test, relatedness will be found if the plaintiff's

claims would not have arisen "but for" the defendant's contacts with the forum state. Even if one accepts Mr. Cloeren's description of the Ninth Circuit process of evaluating claims of personal jurisdiction, there appears to be no argument that the facts of this case would give rise to personal jurisdiction over Mr. Cloeren pursuant to the "but for" test. Mr. Cloeren individually signed the Promissory Note as part of the purchase and subsequent operation of a Wisconsin corporation. Druschel instituted this litigation claiming Mr. Cloeren failed to make the payments called for in the Promissory Note. "But for" Mr. Cloeren's execution of the Promissory Note, Druschel would have had no claim for the breach of that Note.

The next test described by Mr. Cloeren at Pages 18-19 of his Petition is the "in the wake of" test. Mr. Cloeren admits this test "lies closest to the First Circuit's 'proximate cause' standard." (Pet. App. at 18). In order to comply with this test, Druschel's claims must lie "in the wake" of the Wisconsin transaction. See *Heil v. Morrison Knudsen Corp.*, 863 F.2d 546, 549 (7th Cir. 1988). As previously noted, Druschel's claim for breach of the Promissory Note arises directly out of the execution by Mr. Cloeren of that same Promissory Note as part of the purchase of the Wisconsin corporation. It not only lies "in the wake of" the purchase and operation of the Wisconsin corporation, it lies *directly* in the wake of that purchase and arises directly from that purchase. Therefore, the facts of this case would also lead to a finding of personal jurisdiction under the "in the wake of" test.

Finally, Mr. Cloeren also describes a "substantial connection" test he says is employed by the Sixth Circuit. (Pet. App. at 19-20). This test requires, according to Mr. Cloeren, that a substantial connection must exist between

the cause of action and the defendant's forum activities. Again, Druschel's cause of action for Mr. Cloeren's breach of the Promissory Note arises directly out of Mr. Cloeren's contacts with the forum state in purchasing and operating the Wisconsin corporation. The Promissory Note was executed as part of the purchase documents themselves and provided the financing for Mr. Cloeren's purchase of Druschel's stock in the Wisconsin corporation. Thus, there is a substantial connection between the purchase and operation of the Wisconsin corporation and Druschel's claim for breach of the Promissory Note which was a critical part of that forum transaction.

Under any of the "relatedness" tests described in the Petition, personal jurisdiction would be found over Mr. Cloeren in the forum state of Wisconsin. It is not, therefore, necessary for this Court to grant Mr. Cloeren's Petition in order to sort out any alleged "chaos" amongst the Courts of Appeals. Further, the *Burger King*, 471 U.S. 462 (1985), decision provides all the answers necessary for determining that the Wisconsin Court of Appeals did not err in finding Wisconsin had personal jurisdiction over Mr. Cloeren.

In the instant case, Mr. Cloeren, a resident of the State of Texas, similarly "deliberately reached out beyond" Texas and negotiated with the shareholders of a Wisconsin corporation for the purchase of that corporation. (Pet. App. at 2). Mr. Cloeren personally attended the closing of the business purchase in Wisconsin. (Pet. App. at 108). Mr. Cloeren individually obligated himself to payments in excess of $2 Million to Druschel. (Pet. App. at 58). Mr. Cloeren personally pledged the stock he owned in Cloeren, Inc. as collateral. (Pet. App. at 58). Mr. Cloeren continued his involvement with the forum State of Wisconsin by being

actively involved in the daily operation of the Wisconsin corporation and by having consistent and systematic general business contacts with that forum state. (Pet. App. at 26). Mr. Cloeren's daily involvement with the Wisconsin business was found by the trial court to be "substantial in nature and quality." (Pet. App. at 26).

The parallels with the facts of *Burger King* are unmistakable and Mr. Cloeren cannot reasonably claim to be inadequately guided by this Court's precedents on the question of whether his activities in contracting to purchase and operate a Wisconsin corporation would result in his being haled into court there for an alleged breach of the very Promissory Note which was a necessary element of the purchase contracts. The dispute which was the subject of the Wisconsin litigation grew directly out of the purchase contracts which had a "substantial connection" with the forum State. For this reason, it was, as in *Burger King*, "at the very least, presumptively reasonable" for Mr. Cloeren to be called to account in Wisconsin for the injuries. 471 U.S. 480. The claimed split cannot logically have confused Mr. Cloeren as to his exposure to suit in Wisconsin.

Mr. Cloeren further attempts to confuse the issue by asserting that his contacts with the forum State of Wisconsin arising out of the purchase of the Wisconsin corporation constituted an entirely separate transaction from Mr. Cloeren's contacts arising out of the subsequent post sale operation of the Wisconsin corporation. (Pet. App. at 6). This attempt is not supported by existing case law. As noted above, this Court, in *Burger King*, considered the parties "prior negotiations and contemplated future consequences" as a whole in determining whether specific jurisdiction existed sufficient to hale a defendant into

court for failing to make payments due under contracts entered into for the purchase of a franchise. The *Burger King* decision did not artificially separate the contracts which accomplished the purchase of the franchise from the "real object of the business transaction" which included the subsequent operation of that franchise. Similarly, *Burger King* does not support Mr. Cloeren's attempts to separate the contracts which accomplished the purchase of the Wisconsin corporation from the "real object" of that transaction, which included the subsequent operation *in Wisconsin* of that Wisconsin corporation.

Because the Wisconsin Court of Appeals did not decide the jurisdictional question in a way which conflicts with the decision of a United States Courts of Appeals, Mr. Cloeren has not demonstrated a compelling reason for granting his Petition.

II. The Fiduciary Shield Doctrine Does Not Provide A Basis For This Case To Be Reviewed By This Court.

Rule 10 of the Supreme Court of the United States provides considerations governing the review on *certiorari*. As argued below, there are no conflicting decisions amongst the United States Circuit Courts of Appeals on an important federal question involving the fiduciary shield doctrine. There is no conflict of decisions between the Wisconsin Supreme Court and any of the United States Courts of Appeals as to the fiduciary shield doctrine. There is also no conflict between a decision of the Wisconsin Supreme Court and another state court of last resort on an important federal question. There has been no departure from previous statutory or case law. Finally, the fiduciary

shield doctrin[illegible]self does not present an important federal question which needs to be settled by this Court.

A. There Is No Conflict Among The United States Courts Of Appeals On An Important Federal Question In Relation To The Fiduciary Shield Doctrine.

Mr. Cloeren does not cite any United States Courts of Appeals decisions actually stating that personal jurisdiction over corporate officers acting in a fiduciary capacity would violate the due process clause of the 14th Amendment to the United States Constitution. The Petition does reference *Weller v. Cromwell Oil Company*, 504 F.2d 927 (6th Cir. 1974) for expressing doubt over whether the activities of a corporate officer on behalf of a corporation were sufficient to comport with due process clause of the 14th Amendment to the United States Constitution. This proposition and concern has been subsequently addressed by this Court.

In *Calder v. Jones*, 465 U.S. 783 (1984) this Court stated at Page 790:

> Petitioners are correct that their contacts with California are not to be judged according to their employer's activities there. On the other hand, their status as employees does not somehow insulate them from jurisdiction. Each defendant's contacts with the forum State must be assessed individually. See *Rush v. Savchuk*, 444 U.S., at 332, 100 S.Ct., at 579 ("The requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction").

The principle that the employment status of an individual is not a factor in determining jurisdiction was also noted in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) in which this Court noted at Footnote 13, "In *Calder v. Jones*, at ___, 104 S.Ct., at 1487, we today reject the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity."

Subsequent to the *Calder* and *Keeton* decisions, this Court announced its decision in *Burger King Corporation v. Rudzewicz*, 471 U.S. 462 (1985) where the Court discussed at length the constitutional protections under the due process clause of the 14th Amendment to the United States Constitution in relation to jurisdiction over a person. The Court's analysis was made without distinction between actions performed by Mr. Rudzewicz personally and actions performed as a representative of RMBK Corp., the corporation which held the Burger King franchise. The *Burger King* analysis focused on all the personal activities of Mr. Rudzewicz in relation to the State of Florida and its residents. The Petition therefore fails to show a split between the United States Courts of Appeals on the issue of the use and application of the fiduciary shield doctrine.

B. As The Wisconsin Supreme Court Issued No Decision In This Case, There Is No Conflict On An Important Federal Question Between The Wisconsin Supreme Court And Any United States Courts Of Appeals Or Court Of Last Resort Of Another State.

Procedurally, the Wisconsin Court of Appeals issued its decision affirming the prior decision of the trial court finding personal jurisdiction over Mr. Cloeren. (Pet. App.

at 1). Mr. Cloeren then petitioned the Wisconsin Supreme Court for review of the decision of the Court of Appeals. The Wisconsin Supreme Court denied the petition for review without comment on October 10, 2006. (Pet. App. at 39-40). In the present case, there has been no written decision at all by the Wisconsin Supreme Court, Wisconsin's court of last resort. Other courts have noted that the Wisconsin Supreme Court has not previously ruled on the applicability of the fiduciary shield doctrine in Wisconsin. *Hardin Roller Corporation v. Universal Printing Machinery, Inc.*, 236 F.3d 839 (7th Cir. 2001) at Page 842; *Norkol/Fibercore, Inc. v. Gubb*, 279 F.Supp.2d 993 (E.D. Wis. 2003).

Because there is no Wisconsin Supreme Court decision, there is therefore no conflict between a decision of the Wisconsin Supreme Court, the various United States Courts of Appeals, or with a decision of another state's court of last resort.

C. As The Fiduciary Shield Doctrine Does Not Pose An Important Question Of Federal Law, This Case Does Not Present A Question Of Federal Law Which Needs To Be Settled By The United States Supreme Court.

In discussing the fiduciary shield doctrine, the Ninth Circuit Court of Appeals stated in *Davis v. Metro Productions, Inc.*, 885 F.2d 515, 521 (9th Cir. 1989), "Although the assertion of personal jurisdiction in general is an issue of constitutional dimensions, the Supreme Court appears to have signalled that the question whether there exists a jurisdictional corporate shield is not such an issue."

The Ninth Circuit Court of Appeals then cites *Calder v. Jones*, 465 U.S. 783 (1984), and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984):

> The Calder Court stated, "Petitioners are correct that their contacts with California are not to be judged according to their employer's activities there. On the other hand, their status as employees does not somehow insulate them from jurisdiction. Each defendant's contacts with the forum State must be assessed individually." 465 U.S. at 790, 104 S.Ct. at 1487. The Court echoed these statements in *Keeton v. Hustler Magazine, Inc.*: "It does not of course follow from the fact that jurisdiction may be asserted over Hustler Magazine, Inc., that jurisdiction may also be asserted over either of the other [individual] defendants ... [But] we today reject the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity." 465 U.S. 770, 781 n. 13, 104 S.Ct. 1473, 1482 n. 13, 79 L.Ed.2d 790 (1984). Thus in both *Calder* and *Keeton*, the Supreme Court applied the constitutional due process analysis to the contacts of the individuals concerned; it did not consider the existence of a state-created corporation form to create a due process limit on jurisdiction.

Davis, 885 F.2d at 521.

The Seventh Circuit Court of Appeals in its decision in *Hardin Roller Corporation v. Universal Printing Machinery, Inc.*, 236 F.3d 839, 842 (7th Cir. 2001) used similar logic:

> *Calder v. Jones* and *Keeton v. Hustler* establish that the Constitution does not shield persons who act as corporate agents from individual-capacity suits. Thus the fiduciary-shield doctrine is a matter of state law only, and many states do not employ it.

> See generally Sonja Larson, *Validity, Construction, and Application of "Fiduciary Shield" Doctrine – Modern Cases*, 79 A.L.R. (5th series) 587 (2000).

Hardin Roller Corporation, 236 F.3d at 842. (citations omitted).

The fiduciary shield doctrine is not a federal issue but an option available to the states to allow individual defendants additional protections beyond what is required under the due process provisions of the United States Constitution. As this Court and decisions at the United States Courts of Appeals level have already determined the fiduciary shield doctrine does not pose an important federal question, the fiduciary shield doctrine does not provide a basis for review of this case by this Court.

CONCLUSION

The Petition of Mr. Cloeren does not provide a convincing or compelling reason for this Court to grant the Petition. The Respondent therefore respectfully requests the Petition be denied.

Dated this 8th day of February, 2007.

Respectfully submitted,

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